Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: HU/17438/2018

THE IMMIGRATION ACT

Heard at Field House	**Decision & Reasons Promulgated**
On 16th July 2019	**On 7th August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

Mrs Sana Pervaiz

(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Read instructed by direct access

For the Respondent: Mr C Avery Senior Home Officer Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge T R Smith promulgated on the 5th February 2019 whereby the judge dismissed the appellant's appeal against the decision of the respondent to refuse the appellant's claims based on Article 8 of the ECHR, family and private life.

2. I have considered whether or not it is appropriate to make an anonymity direction. Having considered all the circumstances I do not consider it necessary to do so.

3. Leave to appeal to the Upper Tribunal was granted by Deputy Upper Tribunal Judge Taylor on 14th May 2019. Thus the case appeared before me to determine whether or not there was a material error of law in the decision.

4. The grant of leave provided that all the issues raised in the grounds may be argued.

Grounds of appeal

5. The first challenge made to the decision was that the judge failed to take account of the fact that the requirements of the rules that the income of the sponsor at the time of the application had to be £18,600 was met and accordingly the appellant met the requirements of the Immigration Rules.

6. As is evident from the letter of refusal the appellant could not meet the requirements of the rules by reason of her immigration status.

7. There had been a previous appeal by this appellant. At the time of that appeal the appellant had been in the UK with other members of her family, her father, mother and brother. The family had entered as visitors in 2007, when the appellant was 15. The family had remained in the UK. In 2013 the family had been encountered by Immigration Enforcement Officers and sought to remain on the basis of Article 8. The appellant's application for further leave had been refused as had the applications of her family members. Appeals against the refusals of leave to remain had been dismissed in 2014 in a decision by Judge Upson. In considering the issues Judge Upson had dealt with each member of the family separately. The family had sought leave to appeal but had been refused. The decision of Judge Upson determined the rights of the appellant at that time. The appellant, although initially a minor on entry, was at the time of the appeal an adult and had had no legal basis for remaining in the UK.

8. The appellant was unlawfully in the UK. In accordance with Appendix FM the effect of that immigration status was that the appellant had to meet the requirements of EX1, which required an appellant to show that there were insurmountable obstacles to family life continuing in the country to which they would be returned. The judge in considering EX1 was required to consider whether the appellant had established that there were insurmountable obstacles to family life continuing in Pakistan. The judge carefully assessed

whether there were insurmountable obstacles. In so doing the judge was entitled to conclude that there were no insurmountable obstacles to family life continuing in Pakistan and therefore the appellant did not meet the requirements of the rules. The judge has therefore correctly applied the requirements of the rules.

9. Whether the appellant and her sponsor had sufficient income to meet the requirements of the rules, whilst a relevant fact in looking at Article 8 overall, was not determinative of whether the appellant met the requirement of the Immigration Rules. What was material was whether there were insurmountable obstacles to family life continuing in Pakistan. The judge considered the issues of whether there were insurmountable obstacles and has carefully set out reasons for finding that there were not insurmountable obstacles to family life in Pakistan. The judge has properly considered the rules and given valid reasons for finding that the appellant could not satisfy the requirements of the rules.

10. The second ground of appeal argues Judge Smith followed the decision of Judge Upson applying the principles set down in the case of Devasselan [2002] UKAIT 00702. It is argued that the decision of Judge Upson is based on caselaw that has subsequently been overruled and accordingly the decision of Judge Upson should not have been followed.

11. The findings of fact by Judge Upson stand as there is no suggestion that he was not entitled to make the findings that he did. Whilst the case of Gulshan [2013] UKUT 640 (IAC) has been considered in the case of R on the application of Sunasse [2015] EWHC 1604 (Admin), one has to look at whether or not the judge considered Article 8 outside the rules.

12. The case of the appellant is dealt with in paragraph 47 of Judge Upson's decision. The judge having assessed the facts makes the following finding:-

> *"I find that none of this amounts to an arguably good ground for granting leave to remain outside the rules."*

It is clear that the judge was considering the article 8 rights of the appellant outside the rules. It is thereafter that the judge goes on to say:-

> *"Additionally I find that it does not amount to compelling circumstances not sufficiently recognised under the Rules to allow me to go on and consider Ms Sana Pervaiz's case outside the Rules"*

13. In the judgement the judge has considered whether there were good grounds for granting leave outside of the rules on the basis of article 8. Whilst thereafter he has followed the guidance given in the case of Gulshan, any error in following the case would have made no material difference. In any event the approach of the judge considered the principles and the conclusions reached were fully justified in the circumstances.

14. In the light of that there is no material error of law in Judge Smith treating the previous determination as the starting point in assessing the article 8 rights of the appellant. Judge Smith has properly assessed the article 8 rights of the appellant and given valid reasons for reaching the conclusions that he has.

15. The third ground raises the decision in the case of Chikwamba [2008] UKHL 40. The submission made at the hearing by the appellant's representative was that it was conceded that the appellant, if the appellant were returned to Pakistan, would not be able to immediately make an application for entry to the UK, which would be likely to succeed. It is argued that the judge should have ignored the concession and should have looked at the issues of whether the appellant, if returned to Pakistan, could have made an application to enter and would have been likely to succeed. At the hearing before Judge Smith the appellant's representative conceded that the appellant would be denied entry under paragraph 320(7B) of the Immigration Rules.

16. The judge has noted that the concession having been made there was no argument advanced on the issue. The respondent's representative may have had other grounds for arguing that the appellant would not have succeed on such an application but as the concession was made and the point was not being argued, there was no need to advance an argument on such a point.

17. If the argument by the appellant's representative is correct then the representative for the respondent and the judge would have to cover every eventuality in an appeal whether argued or not on behalf of an appellant. It was clear that the representative had considered the matter of whether or not Chikwamba was relevant. The judge was entitled to accept the concession. It was therefore not necessary for either the representative of the respondent or the judge to take an argument that was not being advanced on behalf of the appellant.

18. Thereafter the remaining grounds seek to suggest that the judge has taken into account irrelevant matters. Included in those irrelevant matters is the fact that prior to the parties marrying both parties knew of the appellant's immigration status. Whilst it was accepted in the grounds that the Tribunal were required to find the appellant's status was precarious following the case of Rhuppiah v SSHD [2018] UKSC 58, the judge thereafter should not have held that fact against the appellant as the responsibility for her being in the United Kingdom lay with her parents, who brought into the United Kingdom when she was a minor. It sought to be argued that as the appellant was a minor when she entered the bad behaviour of the parents consistent with the case of KO 2018 UKSC should not have been held against the appellant.

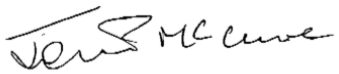
19. In that respect it has to be noted that at the time that the appellant was first encountered by the immigration enforcement officers in April 2013 the appellant was 21. Thereafter the appellant had an appeal decided by Judge Upson. There was reference in that appeal to the fact that the appellant was in a

developing relationship with her present husband. Consistent with the provisions of section 117(4) of the Nationality, Immigration and Asylum Act 2002 and the case law of Rhuppiah little weight should be given to a relationship formed with a qualifying partner established at a time when the person is in the United Kingdom unlawfully. The judge was entitled to comply with the statutory provisions and take account of the circumstances in which the relationship with the appellant's partner was established.

20. In the circumstances there is no material error of law in the decision and I dismiss the appeal.

Notice of Decision

21. I dismiss the appeal on all grounds.

Signed 

Deputy Upper Tribunal Judge McClure Date 30th July 2019